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# A Vindication of the Right to Consular Assistance: The Sixth Amendment in *Osagiede v. United States*

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# A Vindication of the Right to Consular Assistance: The Sixth Amendment in *Osagiede v. United States*

## **Cover Page Footnote**

International Law; Commercial Law; Law

# A Vindication of the Right to Consular Assistance: The Sixth Amendment in *Osagiede v. United States*<sup>1</sup>

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## I. Introduction

Federal agents arrested Johnbull Osagiede, a Nigerian national, on March 13, 2003, but did not inform him of his right to consular assistance under Article 36 of the Vienna Convention on Consular Relations.<sup>2</sup> While this failure of notification violates the requirements of Article 36,<sup>3</sup> courts disagree on the existence of an individual enforceable right under the Convention<sup>4</sup> and the proper way to vindicate a violation.<sup>5</sup> This disagreement generally prevents a person in Osagiede’s position from seeking a remedy

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<sup>1</sup> 543 F.3d 399 (7th Cir. 2008).

<sup>2</sup> Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

<sup>3</sup> *Id.* at ¶ 1(d).

<sup>4</sup> See *infra* Part III.

<sup>5</sup> See generally *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that suppression of the evidence was not an available remedy for a violation of Article 36).

based on an Article 36 violation.<sup>6</sup> However, the Seventh Circuit's decision in *Osagiede v. United States* makes a remedy available for Article 36 violations as part of a constitutional Sixth Amendment argument.<sup>7</sup>

Part II of this Note outlines the facts and decision in *Osagiede* and discusses the reasoning behind the Seventh Circuit's decision. Part III examines the background law embedded in the Supreme Court's decision in *Sanchez-Llamas v. Oregon*,<sup>8</sup> the decisions of the other United States Courts of Appeals, and the Seventh Circuit's previous decisions. Part IV analyzes *Osagiede's* effect on future Article 36 claims in the United States federal court system. Finally, Part V concludes with the decision's likely impact on counsel for foreign nationals and the possibility of effective protection of the right to consular assistance in the future.

## II. Statement of the Case

### A. The Facts

Federal law enforcement officers arrested appellant Johnbull Osagiede, a Nigerian national, on drug charges in 2003<sup>9</sup> without informing him of his right to consular assistance under Article 36 of the Vienna Convention on Consular Rights.<sup>10</sup> During a "controlled buy" arranged by federal agents, Osagiede exchanged twenty-five grams of heroin with Michael Braxton for \$3,000 in cash in a Sears parking lot in Chicago, Illinois.<sup>11</sup> Federal agents arrested Osagiede on March 13, 2003 and on March 18 charged him, along with two co-defendants, with four counts of heroin distribution and conspiracy to distribute heroin.<sup>12</sup> On January 9, 2004, Osagiede plead guilty to one count of distributing twenty-five grams of heroin after his attorney, Kenyatta Tatum, advised Osagiede he would receive only eighteen months of jail time.<sup>13</sup>

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<sup>6</sup> *Id.*

<sup>7</sup> See *Osagiede v. United States*, 543 F.3d 399 (7th Cir. 2008).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 404.

<sup>10</sup> *Id.* at 402 ("The Government conceded that it failed to inform Osagiede of his right, in clear violation of the Article 36.").

<sup>11</sup> *Id.* at 404.

<sup>12</sup> *Id.*

<sup>13</sup> *Osagiede*, 543 F.3d at 404.

During this time, Osagiede's counsel neither informed him of his rights under Article 36 nor raised the issue to the Government or the presiding judge.<sup>14</sup> At the sentencing hearing, the Government intended to show through co-defendant testimony that Osagiede distributed 1300 grams of heroin with the corroboration of nine wiretapped recordings.<sup>15</sup> The strong Nigerian accent of the speaker on the tapes made it difficult to identify the voice and Osagiede denied that the voice belonged to him.<sup>16</sup> To dispute the tapes, Tatum convinced Osagiede to hire an expert to analyze the tape recordings; the expert analyzed one tape and found that the voice did not belong to Osagiede.<sup>17</sup> The Government admitted that this tape did not contain Osagiede's voice, but the court allowed the other eight recordings into evidence and determined the base offense level as thirty-two.<sup>18</sup> The district court judge sentenced Osagiede to ninety-seven months in prison, less than the sentencing recommendation for a base offense of thirty-two.<sup>19</sup>

### *B. The District Court Decision*

Osagiede did not appeal this sentence, but filed a pro se petition for a writ of habeas corpus<sup>20</sup> in the Northern District of Illinois on April 25, 2006, arguing a denial of his Sixth Amendment<sup>21</sup> right to effective assistance of counsel because of counsel's failure to notify him of his rights under the Vienna Convention and counsel's failure to raise that issue at trial.<sup>22</sup> The district court denied the petition without an evidentiary hearing. Judge Korcoras explained that since dismissal of the indictment is not a recognized remedy for an Article 36 violation, it would have been "extremely unlikely that a motion to dismiss the indictment

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<sup>14</sup> *Id.*

<sup>15</sup> The Government needed corroboration in part because Braxton previously mistook Osagiede for his cousin, Akeem Lasisi, and because the phone number Braxton called to set up the deals could belong to either Lasisi or Osagiede. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 405.

<sup>19</sup> *Osagiede*, 543 F.3d at 405.

<sup>20</sup> See 28 U.S.C. § 2255 (2006).

<sup>21</sup> U.S. CONST. amend. VI.

<sup>22</sup> *Osagiede*, 543 F.3d at 405.

by Osagiede's attorney would have been successful."<sup>23</sup> Osagiede appealed this determination to the United States Court of Appeals for the Seventh Circuit.<sup>24</sup>

### C. *The Seventh Circuit Decision*

The Seventh Circuit construed Osagiede's petition liberally because he filed pro se.<sup>25</sup> The court determined that despite asking for the incorrect type of remedy in his application for appeal, "Osagiede alleged a recognized and undisputed violation of his rights, under the federal regulation if not under the Convention itself."<sup>26</sup> This finding by the court entitled the petitioner to a review of the decision from the district court.

The court began by instructing on the position of the Vienna Convention under federal law. The Convention "is an international treaty that governs relations between individual nations and foreign consular officials."<sup>27</sup> Since the United States ratified the treaty in 1969, the Convention became the "supreme Law of the Land."<sup>28</sup> Next, the court looked to the codification of the right to consular assistance in federal regulations for law enforcement agencies.<sup>29</sup> These regulations included a specific instruction by the U.S. Department of State: "When foreign nationals are arrested or detained, they must be advised of the right to have their consular officials notified."<sup>30</sup> Finally, in its analysis of the importance of the consular assistance, the court expresses concern that in some cases consulates may be the only venue through which a foreign national can obtain assistance, as when evidence may be found only in the home country.<sup>31</sup> Thus, a

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 402 (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 366 (2006)).

<sup>28</sup> *Osagiede*, 543 F.3d at 402 (quoting U.S. CONST. art. VI, cl. 2).

<sup>29</sup> The court looked at regulations that required conformity with Article 36 for the Department of Justice, 28 C.F.R. § 50.5 (2003), and for the Immigration and Naturalization Service, 8 C.F.R. § 236.1(e) (2003). *Id.*

<sup>30</sup> *Id.* (quoting U.S. DEP'T OF STATE, PUB. NO. 10518, CONSULAR NOTIFICATION AND ACCESS: INSTRUCTION FOR FEDERAL, STATE AND LOCAL ENFORCEMENT AND OTHER OFFICIALS REGARDING FOREIGN NATIONALS IN THE UNITED STATES 13-15 (Jan. 1998)).

<sup>31</sup> *Id.* at 403-04 (quoting Linda Jane Springrose, Note, *Strangers in a Strange*

foreign national's lack of access to his consulate may form the basis for prejudice by eliminating key evidence from the trial.

The court distinguishes this case from the *Sanchez-Llamas*<sup>32</sup> decision in order to refute the Government's contention that *Sanchez-Llamas* "forecloses foreign nationals from bringing ineffective assistance of counsel claims based on Article 36 violations."<sup>33</sup> The court first notes that Osagiede makes a Sixth Amendment claim, not a claim under the Vienna Convention, thus subjecting it to an analysis under *Strickland v. Washington* and not *Sanchez-Llamas*.<sup>34</sup> The existence of rights and remedies under the Vienna Convention thus remains "relevant only to the extent that it helps prove or disprove one of these elements."<sup>35</sup> Furthermore, the decision in *Sanchez-Llamas* suggests other remedies instead of suppression, including "rais[ing] an Article 36 violation as a part of a broader constitutional challenge, such as a challenge to the voluntariness of a statement under the Fifth Amendment."<sup>36</sup> The Seventh Circuit likens such a Fifth Amendment argument to the use of the Sixth Amendment in Osagiede's case<sup>37</sup> and finds authorization for the use of a Sixth Amendment claim in the text of the majority decision,<sup>38</sup> as well as in Justice Ginsburg's concurrence.<sup>39</sup> In addition, the court notes that discussion of the Sixth Amendment claim "was no accident" and that "the viability

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*Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L. J. 185, 196 (1999)). The court also provides a specific example from a Supreme Court case where another suspect in the crime fled to the home country of Honduras before trial. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 341 (2006).

<sup>32</sup> 548 U.S. 331 (2006).

<sup>33</sup> *Osagiede*, 543 F.3d. at 407.

<sup>34</sup> *Id.* at 405 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>35</sup> *Id.* at 406-7.

<sup>36</sup> *Id.* at 407 (citing *Sanchez-Llamas*, 548 U.S. at 350).

<sup>37</sup> *Id.* at 407.

<sup>38</sup> In particular, the Seventh Circuit emphasized the Supreme Court's statement that "an attorney's failure to raise an Article 36 violation would not be 'cause' for overriding a state's procedural default rules, unless 'the attorney's overall representation falls below what is required by the Sixth Amendment.'" *Id.* (quoting *Sanchez-Llamas*, 548 U.S. at 357 n.6 (emphasis added)).

<sup>39</sup> The court refers to Justice Ginsburg's note that, "nothing prevented [Bustillo] from raising an ineffective-assistance-of-counsel claim predicated on his trial counsel's failure to assert the State's violation of those rights." *Osagiede*, 543 F.3d at 407 (quoting *Sanchez-Llamas*, 548 U.S. at 364 n.3 (Ginsburg, J., concurring)).

of ineffective assistance of counsel claims had been discussed extensively at oral argument.”<sup>40</sup> The court concludes by deciding that *Sanchez-Llamas* does not foreclose a foreign national from making an ineffective assistance of counsel claim based on Article 36 violations; rather, the court finds that the case “appears to express a preference for subsuming Vienna Convention claims in broader constitutional attacks, rather than basing relief entirely on the treaty itself.”<sup>41</sup>

After finding authorization for a Vienna Convention claim based on constitutional grounds in the Supreme Court’s decision in *Sanchez-Llamas*, the Seventh Circuit analyzed the Sixth Amendment claim. The court relied on *Strickland* to assert that “the right to counsel [under the Sixth Amendment] is the right to effective counsel.”<sup>42</sup> Thus, violation of the statute depends on the actions of the claimant’s counsel. In addition, the court stated that foreign nationals in the United States are entitled to protection by the Sixth Amendment during criminal prosecution.<sup>43</sup> The Sixth Amendment protection therefore extends to Johnbull Osagiede, a Nigerian national criminally prosecuted in the United States.

The Seventh Circuit next determined the appropriate standard of review. The appellate court conducts a de novo review of the legal issues in the district court’s decision for abuse of discretion.<sup>44</sup> The court must decide whether a § 2255 motion requires an evidentiary hearing by determining whether the record “conclusively show[s] that the prisoner is entitled to no relief.”<sup>45</sup> The court of appeals then stated that the dependence of an ineffective assistance claim on facts not entirely on record often requires an evidentiary hearing.<sup>46</sup>

The court goes on to analyze the claim under the *Strickland*<sup>47</sup> two-prong test to review the denial of an evidentiary hearing by the district court. The first part of the *Strickland* test asks if

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<sup>40</sup> *Id.* at 407.

<sup>41</sup> *Id.* at 408.

<sup>42</sup> *Id.* at 406.

<sup>43</sup> *Id.* (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

<sup>44</sup> *Id.* at 408.

<sup>45</sup> *Osagiede*, 543 F.3d at 408 (quoting 28 U.S.C. § 2255(b)).

<sup>46</sup> *Id.* (citing *Shaw v. United States*, 24 F.3d 1040, 1043 (8th Cir. 1994)).

<sup>47</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).



“counsel’s performance fell below an objective standard of reasonableness when measured against ‘prevailing professional norms.’”<sup>48</sup> For this inquiry, the court begins by stating that “[t]he law was on the books; the violation was clear. Simple computer research would have turned it up.”<sup>49</sup> In other words, Osagiede’s counsel had access to multiple sources of information that informed him of his client’s right to consular assistance. The court gives as evidence of the law’s clarity and accessibility the relatively recent decision in *Sanchez-Llamas* referring to Article 36 rights.<sup>50</sup> The court also notes the decisions in three Illinois district courts that held that the Vienna Convention created individually enforceable rights, refuting the government’s contention that counsel was not objectively deficient because counsel could not make an argument based on violation of the Convention.<sup>51</sup> Further evidence of the notice to counsel of the petitioner’s rights includes the previous discussion of federal regulations requiring compliance with Article 36.<sup>52</sup> Finally, cases such as *Breard v. Pruett*<sup>53</sup> and *Murphy v. Netherland*<sup>54</sup> recognized claims under the Vienna Convention as commonplace and available to counsel.<sup>55</sup>

Based on this analysis, the Seventh Circuit concluded that counsel to a foreign national “should have known to advise their clients of the right to consular access and to raise the issue with the presiding judge.”<sup>56</sup> The court noted but one exception to such a Sixth Amendment claim: a strategic decision by counsel not to

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<sup>48</sup> *Osagiede*, 543 F.3d at 408 (citing *Strickland*, 466 U.S. at 687-96).

<sup>49</sup> *Id.* at 409.

<sup>50</sup> *Id.* at 409 n.7.

<sup>51</sup> *Id.* at 410 (citing *United States ex rel. Madej v. Schomig*, 2002 U.S. Dist. LEXIS 20170, at \*3 (N.D. Ill. 2002); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1121, 1125 (C.D. Ill. 1999)). The court also refers to the decisions in several district courts throughout the United States that held the Vienna Convention conferred individually enforceable rights. See *infra* note 77 and accompanying text.

<sup>52</sup> See *supra* note 29 and accompanying text.

<sup>53</sup> 134 F.3d 615 (4th Cir. 1998).

<sup>54</sup> 116 F.3d 97 (4th Cir. 1997).

<sup>55</sup> *Osagiede*, 543 F.3d at 411 n.12 (citing *Breard*, 134 F.3d at 619-20, *Murphy*, 116 F.3d at 100).

<sup>56</sup> *Id.* at 411.

raise an Article 36 violation, as in *Sanchez-Llamas*.<sup>57</sup> In analysis of the record, the court found no evidence of such a strategic decision by Osagiede's counsel or evidence that counsel knew of Article 36.<sup>58</sup> Unable to find evidence regarding these two facts, the court concluded that when "the record contains insufficient facts to explain counsel's actions as tactical," as in this case, there generally must be an evidentiary hearing.<sup>59</sup>

Finally, the court turned to the second prong under the *Strickland* test, where it must determine if "but for the deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different."<sup>60</sup> Since the court had previously determined that *Sanchez-Llamas* need not foreclose a remedy under Article 36,<sup>61</sup> the court continues by identifying possible remedies, including informing the defendant of his rights under the Convention and raising the issue with the judge.<sup>62</sup> The failure of counsel to seek these two possible remedies "precluded Osagiede from exercising his right to consular assistance and may well have been prejudicial."<sup>63</sup>

To determine if this failure of counsel requires an evidentiary hearing on the existence of prejudice, the court looked to the record for evidence of the type of assistance Osagiede might receive from the Nigerian consulate.<sup>64</sup> In particular, the court noted the analysis of the tape recordings as a possible area where the Nigerian consulate might provide the funds or expertise necessary for proper analysis.<sup>65</sup> The court also suggested that the

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<sup>57</sup> *Id.* (citing Mark J. Kadish & Charles C. Olson, *Sanchez-Llamas and Article 36 of the Vienna Convention: The Supreme Court, the Right to Consul, and Remediation*, 27 MICH. J. INT'L L. 1185, 1219 (2006)).

<sup>58</sup> *Id.* at 411.

<sup>59</sup> *Id.* at 412 (citing *United States v. Leonti*, 326 F.3d 1111, 1122 (9th Cir. 2003)).

<sup>60</sup> *Id.* at 408 (citing *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984)).

<sup>61</sup> See *supra* notes 32-41 and accompanying text.

<sup>62</sup> *Osagiede*, 543 F.3d at 412. The court refers specifically to the potential reaction of a trial court to such a violation; it "'can make the appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.'" *Id.* (quoting *Sanchez-Llamas*, 548 U.S. 331, 350 (2006)).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 413. To show that concrete prejudice flowed from the deprivation of his right to notification, Osagiede must explain the nature of the assistance he might have received had he been alerted to his Article 36 rights. *Id.*

<sup>65</sup> *Id.* The court suggests the Consulate may assist with the identification of

Nigerian consulate might assist by locating Osagiede's cousin, Akeem Lasisi, in Nigeria.<sup>66</sup> These factors appear to show the Nigerian consulate's ability to assist Osagiede and "[go] a long way toward showing that he deserves an evidentiary hearing."<sup>67</sup> However, the court determined that while the Nigerian consulate *could have* assisted Osagiede,<sup>68</sup> the petitioner must also show that the consulate *would have* helped him.<sup>69</sup> No "credible assertion of the assistance the consulate would have provided" appears in the record and the court instructs the petitioner to provide such an assertion for the district judge to entitle him to an evidentiary hearing.<sup>70</sup>

The court remanded the case to the lower court to determine whether Osagiede's counsel made a strategic decision not to raise the violation in the trial court and to explore a possible assertion of the consulate.

### III. Background Law

#### A. *An Individual Enforceable Right*

In general, courts disagree or choose not to rule on the existence of an individual enforceable right under the Vienna Convention.<sup>71</sup> In *Sanchez-Llamas*, the controlling decision on this issue, the Supreme Court found it "unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights"<sup>72</sup> because the court concluded that the petitioners are not entitled to relief on their claims.<sup>73</sup> Despite its refusal to address the question, the Court assumed that Article 36 creates such an individual enforceable right for the purposes of its

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regional dialects, analysis of the voices, or translation. *Id.*

<sup>66</sup> *Id.* The court notes the previous mistaken identification of Lasisi for Osagiede and the discrepancy in ownership of the telephone number where Braxton made the calls. *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Osagiede*, 543 F.3d at 413.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Kadish, *supra* note 57, at 1194.

<sup>72</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343 (2006).

<sup>73</sup> *Id.*

analysis of the petitioner's claims.<sup>74</sup> A majority of the federal courts of appeals do not recognize an individual enforceable right, but rather assume it as the Supreme Court did in *Sanchez-Llamas*.<sup>75</sup> A minority of courts have definitively stated that the Vienna Convention does not create an individual enforceable right.<sup>76</sup> Finally, several district courts have found that the Vienna Convention does confer individually enforceable rights.<sup>77</sup>

The Seventh Circuit, in contrast to the other Courts of Appeals and the Supreme Court and in unison with several district courts,<sup>78</sup> recognizes an individual enforceable right conferred by the Vienna Convention in *Jogi v. Voges*.<sup>79</sup> In this case, the Seventh Circuit looks to the plain language of the treaty: "Article 36 P1(b) states, plainly enough, that authorities 'shall inform the person concerned without delay of his rights under this sub-paragraph.'"<sup>80</sup> The court rejects the idea that the language of the preamble shows a lack of individually enforceable rights.<sup>81</sup> Finally, the court in *Jogi* refers

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<sup>74</sup> *Id.*

<sup>75</sup> *Osagiede*, 543 F.3d at 409 & n.7 (citing *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam)); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986 (10th Cir. 2001); *United States v. Chanthadara*, 230 F.3d 1237, 1255-56 (10th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir. 2000) (en banc); *United States v. Li*, 206 F.3d 56, 61-62 (1st Cir. 2000); *Murphy v. Netherland*, 116 F.3d 97, 99-1000 (4th Cir. 1997)). See also *United States v. Ortiz*, 315 F.3d 873, 886 (8th Cir. 2002).

<sup>76</sup> See, e.g., *Cardenas v. Dretke*, 405 F.3d 244, 252 (5th Cir. 2005); *United States v. Emuegbunam*, 268 F.3d 377, 392-93 (6th Cir. 2001).

<sup>77</sup> *Osagiede*, 543 F.3d at 410 & n.6 (citing *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Briscoe*, 69 F. Supp. 2d 738, 745-46 (D. V.I. 1999); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 677-78 (D. V.I. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States v. \$69,530.00 in U.S. Currency*, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998)).

<sup>78</sup> See *supra* note 72 and accompanying text.

<sup>79</sup> 480 F.3d 822, 836 (2007).

<sup>80</sup> *Id.* at 833 (citing Vienna Convention, *supra* note 2 (emphasis added)).

<sup>81</sup> See *Jogi*, 480 F.3d at 833-35. The language of the preamble reads as follows: "Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions by consular posts on behalf of their respective states." *Id.* at 833 (citing Vienna Convention, pmbl., Apr. 24, 1963, 21 U.S.T. 77, 3-4, 596 U.N.T.S. 261 (emphasis added)). The court regards the preamble as unnecessary for analysis because of the clarity of language in Article 36.

to the Supreme Court statement that, “a treaty should generally be construed . . . liberally to give effect to the purpose which animates it and that even where a provision of a treaty fairly admits of two constructions . . . the more liberal interpretation is to be preferred.”<sup>82</sup> Considering all of these factors, the court determines that “Article 36 confers individual rights on detained nationals.”<sup>83</sup> This decision in *Jogi* distinguished the Seventh Circuit from its sister circuits and the Supreme Court on the issue of individually enforceable rights under the Vienna Convention.

### *B. Remedies for Violation of the Right*

The remedies for a violation of Article 36 discussed in *Osagiede* take two forms: general remedies and judicial remedies. The decision in *Sanchez-Llamas* discusses such general remedies: “[i]f [the defendant] raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance.”<sup>84</sup> In the case of one petitioner in *Sanchez-Llamas*, Mario Bustillo, the Honduran consulate executed an affidavit that “it would have endeavored to help Mr. Bustillo in his defense” had it learned of his detention prior to trial.”<sup>85</sup> In addition to this, the majority opinion in *Sanchez-Llamas* notes that “diplomatic avenues—the primary means of enforcing the Convention—also remain open.”<sup>86</sup> Such actions can remedy a violation before a conviction or adverse sentencing occurs.

An obstacle exists to the second remedy to Article 36 violations, judicial remedies, in the form of procedural bars. A procedural bar occurs because a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief.<sup>87</sup> The Supreme Court analyzed such a case in *Breard v.*

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Furthermore, the court suggests that the preamble refers to the Convention’s position as a benefit to the official consular position, but not to diplomats in a private capacity. *Jogi*, 480 F.3d at 833.

<sup>82</sup> *Jogi*, 480 F.3d at 834 (quoting *United States v. Stuart*, 489 U.S. 353, 368 (1989)).

<sup>83</sup> *Id.* at 834.

<sup>84</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006).

<sup>85</sup> *Id.* at 341 (quoting *J.A. at 74, Bustillo v. Johnson*, No. 05-51 (U.S.)).

<sup>86</sup> *Id.* at 350.

<sup>87</sup> *See Breard v. Greene*, 523 U.S. 371, 376 (1998).

*Greene*<sup>88</sup> and found the petitioner's habeas motion based on Article 36 procedurally barred because he did not raise his claim in trial or on appeal in state court.<sup>89</sup> Similarly, the lower Virginia court denied the second petitioner in *Sanchez-Llamas*, Mario Bustillo, a habeas corpus claim because of the procedural bar.<sup>90</sup> In *Sanchez-Llamas*, the Supreme Court dismissed decisions by the International Court of Justice (ICJ) that criticized the application of these procedural default rules. The ICJ reasoned that such rules "prevented [courts] from attaching any legal significance to the fact that the violation of Article 36 kept the foreign governments from assisting in their nationals' defense."<sup>91</sup> However, the Court maintained that ICJ decisions are not controlling over Supreme Court decisions.<sup>92</sup> In this way, procedural bars prevent U.S. courts from exploring judicial remedies to a Vienna Convention violation because it precludes the court from hearing the claim.

Examples of judicial remedies for a violation of Article 36 include requests for suppression of evidence and private actions. In *Sanchez-Llamas*, the first petitioner, Moises Sanchez-Llamas, contends that suppression of his incriminating statements to the police is required because the authorities did not notify him of his rights under Article 36.<sup>93</sup> The Supreme Court distinguishes the use of suppression as a remedy in this case from authorized use in cases that "arose directly out of statutory violations that implicated important Fourth and Fifth Amendment interests."<sup>94</sup> The Court also distinguishes Fourth and Fifth Amendment violations from Article 36 violations based on the possible effects on testimony and search and seizure. The Court determined that an Article 36 violation is "unlikely, with any frequency, to produce unreliable

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<sup>88</sup> 523 U.S. 371 (1998).

<sup>89</sup> *Sanchez-Llamas*, 548 U.S. at 351 (citing *Breard*, 523 U.S. at 375).

<sup>90</sup> *Id.* at 350.

<sup>91</sup> *Id.* at 353 (quoting *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497, (June 27)).

<sup>92</sup> *Id.* at 355-56.

<sup>93</sup> See generally *id.*

<sup>94</sup> *Id.* at 348. The court notes a case that implicated Fifth Amendment-like issues when authorities held a defendant for a prolonged period without facing a judge in violation of a statute. *Id.* (citing *McNabb v. United States*, 318 U.S. 332, 344 (1943)). The court also discusses a case based on the Fourth Amendment's protection against unreasonable search and seizure where the authorities obtained evidence during an unlawful arrest. *Id.* at 348-49 (citing *Miller v. United States*, 357 U.S. 301, 305 (1958)).

confessions” and has no impact on Fourth Amendment rights.<sup>95</sup> Thus, the Court concludes that suppression is the inappropriate remedy for an Article 36 violation.

In *Jogi*, the Seventh Circuit explored a private tort claim for violation of Article 36 brought by a foreign national under the Alien Tort Statute (ATS),<sup>96</sup> “which establishes jurisdiction in the district courts over a civil action by an alien for a tort committed in violation of a treaty of the United States.”<sup>97</sup> The court found the ATS awarded jurisdiction over claims such as violations under the Vienna Convention to federal courts. The Seventh Circuit determined that the Vienna Convention is self-executing<sup>98</sup> and that it creates an individually enforceable right.<sup>99</sup> The court specifically noted the language of the Vienna Convention that says

the rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, *subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.*<sup>100</sup>

With this language in mind, the court determined that the treaty calls for the existence of a remedy, and since the United States’ courts rejected all other claims including suppression, only a claim for money damages remained.<sup>101</sup> In summation, the court found that the Vienna Convention allowed a private action for damages as a remedy.<sup>102</sup>

### *C. Sixth Amendment Use—Ineffective Assistance of Counsel*

One early hint of the use of a Sixth Amendment claim in recognition of a foreign national’s rights under Article 36 occurred

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<sup>95</sup> *Sanchez-Llamas*, 548 U.S. at 349.

<sup>96</sup> 28 U.S.C. § 1350 (2000).

<sup>97</sup> *Jogi v. Voges*, 425 F.3d 367, 370 (7th Cir. 2005).

<sup>98</sup> *Id.* at 378.

<sup>99</sup> *Id.* at 382.

<sup>100</sup> *Id.* at 385 (citing Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (emphasis added)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

in *Murphy v. Netherland*.<sup>103</sup> Despite the court's inability to find a constitutional claim based on the petition, the court gives a lengthy discussion on the availability of Article 36 information to attorneys.<sup>104</sup> Specifically, the court says that "a reasonably diligent search by Murphy's counsel . . . would have revealed the existence and applicability (if any) of the Vienna Convention" and that "[t]reaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national."<sup>105</sup> Furthermore, the court lists several federal cases preceding this one that involve Article 36 claims.<sup>106</sup>

Another authorization for the use of the Sixth Amendment in Article 36 claims comes from the decision in *Sanchez-Llamas* and referenced in the concurrence by Justice Ginsburg. The decision in *Sanchez-Llamas* suggested that a petitioner could vindicate his rights under the Vienna Convention "as part of a broader challenge to the voluntariness of [a detainee's] statements to police."<sup>107</sup> Justice Ginsburg's concurrence discussed the use of a Sixth Amendment claim in the case of the petitioner, Bustillo, whose argument against a procedural bar failed in part because his attorney, not the United States, neglected to inform him of his consular rights.<sup>108</sup> Ginsburg pointed out that "once Bustillo became aware of his Vienna Convention rights, nothing prevented him from raising an ineffective-assistance-of-counsel claim

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<sup>103</sup> 116 F.3d 97 (4th Cir. 1997). In this decision, the Court of Appeals for the Fourth Circuit rejected a petition for habeas corpus relief from the petitioner's Virginia conviction and death sentence, holding that the violation of the right to consular assistance under the Vienna Convention did not constitute a "substantial showing of the denial of a constitutional right" of the petitioner and that such a claim is procedurally barred. *Id.* at 101.

<sup>104</sup> The Fourth Circuit's discussion here, while instructive on the prominence and accessibility of information regarding Article 36, does not appear to promote a Sixth Amendment claim.

<sup>105</sup> *Murphy*, 116 F.3d at 100.

<sup>106</sup> *Id.* (citing *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Mami v. Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States v. Rangel-Gonzalez*, 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979)).

<sup>107</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006). The court does not refer specifically to the use of the Sixth Amendment here, but refers to use of an Article 36 claim as part of a Fifth Amendment claim.

<sup>108</sup> *Id.* at 364 (Ginsburg, J., concurring).



predicated on his trial counsel's failure to assert the State's violation of those rights."<sup>109</sup> Thus, the *Sanchez-Llamas* majority opinion and concurrence look to constitutional claims underlying an Article 36 violation and point in the direction of the Sixth Amendment.

*Strickland v. Washington*<sup>110</sup> controls in a Sixth Amendment ineffective assistance of counsel case such as *Osagiede*.<sup>111</sup> The Supreme Court in *Strickland* examined petitioner's claim of ineffective assistance of counsel.<sup>112</sup> Once the Court determined that an ineffective assistance of counsel claim existed,<sup>113</sup> it identified the actions that showed the counsel's performance was deficient: a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the *Sixth Amendment*. Second, the defendant must show that the deficient performance prejudiced the defense."<sup>114</sup> The Supreme Court notes that an examination of counsel's assistance looks at "the reasonableness of counsel's challenged conduct on the facts of the particular case."<sup>115</sup> This test identifies the standard required in the *Osagiede* analysis by the Seventh Circuit.

In *Strickland*, the Supreme Court notes that respondent's counsel "made a strategic choice" that corresponded with the other acts identified in the claim and that the defense "was the result of reasonable professional judgment."<sup>116</sup> In addition, because of the severity of the crimes involved in the case, a sentencing hearing

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<sup>109</sup> *Id.* at 364 n.3 (Ginsburg, J., concurring).

<sup>110</sup> 466 U.S. 668 (1984).

<sup>111</sup> *Osagiede v. United States*, 543 F.3d 399, 406 (7th Cir. 2008) (stating "[b]ecause this is a Sixth Amendment ineffective assistance of counsel claim, it is controlled by *Strickland* and its familiar two-prong test.")).

<sup>112</sup> *Strickland v. Washington*, 466 U.S. 668, 675 (1984) (stating that there are six possible examples of ineffective counsel: "fail[ing] to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.")).

<sup>113</sup> *Id.* at 686. The Court states that "the Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

<sup>114</sup> *Strickland*, 466 U.S. at 687.

<sup>115</sup> *Id.* at 690.

<sup>116</sup> *Id.* at 699.

“would barely have altered the sentencing profile presented to the sentencing judge.”<sup>117</sup> The Court’s application here requires more than a showing of minor prejudice to make an ineffective assistance of counsel claim, both in the recognition of counsel’s insufficiency and the resulting prejudice.

Finally, the Supreme Court cautions in *Strickland* that “[c]ourts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.”<sup>118</sup> Such a warning leads to policy arguments against any case that seeks a new basis for a Sixth Amendment claim, as in *Osagiede*.<sup>119</sup>

#### IV. Significance of the Case

The Seventh Circuit’s decision in *Osagiede* stands out from the previous decisions in other circuits and the Supreme Court, both as a result of its recognition of an individual enforceable right under Article 36 of the Vienna Convention,<sup>120</sup> and in recognizing a claim for the violation of that right.<sup>121</sup>

##### A. An Individual Enforceable Right

Although *Jogi* did not control in the Seventh Circuit at the time of the district court’s decision in *Osagiede*, the court nonetheless emphasizes in *Osagiede*<sup>122</sup> that it always recognized the individual rights conferred by Article 36 as implicit in *United States v. Lawal*<sup>123</sup> and *United States v. Chaparro-Alcantara*.<sup>124</sup> In *Osagiede*, the Seventh Circuit bases its decision on the silence and

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<sup>117</sup> *Id.* at 699-700.

<sup>118</sup> *Id.* at 697.

<sup>119</sup> See *infra* notes 134-37 and accompanying text.

<sup>120</sup> See *supra* note 51 and accompanying text.

<sup>121</sup> See *supra* notes 32-41 and accompanying text.

<sup>122</sup> *Osagiede*, 543 F.3d 1045, 409-10.

<sup>123</sup> 231 F.3d 1045, 1048 (7th Cir. 2000). There is, however, little difference between the treatment of the individual rights issue in *Lawal* and that in *Sanchez-Llamas*. The court in *Lawal* says that “While some courts, including ours, have had the opportunity to decide whether Article 36 creates individual rights enforceable in judicial proceedings, all have sidestepped the issue . . . Likewise, we need not decide the issue today because it does not affect our disposition of this case.” *Id.* This treatment of the individual rights issue remains similar to the decision in *Sanchez-Llamas v. Oregon*. See *supra* notes 73-74 and accompanying text.

<sup>124</sup> 226 F.3d 616, 622 (7th Cir. 2000).

use of assumptions in the analyses of other court decisions, despite the two courts that found no individual rights.<sup>125</sup> Moreover, the courts cited as in agreement with the Seventh Circuit on the individual rights issue represent district courts in the circuits not mentioned in the *Osagiede* analysis.<sup>126</sup> Therefore, while the case both affirms the Seventh Circuit's previous decisions on the individual rights issue, it also challenges the silence of the other courts of appeals and the Supreme Court.

Additionally, the Seventh Circuit noted that the issue of individual rights does not stand as a requirement to begin analysis of the Sixth Amendment claim. The court emphasized this point while distinguishing *Sanchez-Llamas* from *Osagiede*'s claim, noting that "[w]hether rights and remedies are available under Article 36 of the Vienna Convention is relevant only to the extent that it helps prove or disprove one of these elements."<sup>127</sup> Thus, the court only reaches the issue in its analysis of the reasonableness of counsel's actions.<sup>128</sup> However, with previous authorities such as Ginsburg's concurrence in *Sanchez-Llamas*<sup>129</sup> describing the use of a Sixth Amendment claim without mention of individual rights and the comment in *Murphy* that "[t]reaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national,"<sup>130</sup> it seems that other courts may find Sixth Amendment violations without recognizing the individual rights conferred by the Vienna Convention.

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<sup>125</sup> See *supra* text accompanying notes 73-77.

<sup>126</sup> *Osagiede v. United States*, 543 F.3d 399, 409 n.6 (7th Cir. 2008) (citing *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001); *United States v. Briscoe*, 69 F. Supp. 2d 738, 745-46 (D. V.I. 1999); *United States v. Miranda*, 65 F. Supp. 2d 1002, 1007 (D. Minn. 1999); *United States v. Torres-Del Muro*, 58 F. Supp. 2d 931, 933 (C.D. Ill. 1999); *United States v. Hongla-Yamche*, 55 F. Supp. 2d 74, 78 (D. Mass. 1999); *United States v. Superville*, 40 F. Supp. 2d 672, 677-78 (D. V.I. 1999); *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125 (C.D. Ill. 1999); *United States v. \$69,530.00 in U.S. Currency*, 22 F. Supp. 2d 593, 594 (W.D. Tex. 1998); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1095-96 (S.D. Cal. 1998)).

<sup>127</sup> *Osagiede*, 543 F.3d at 406-07.

<sup>128</sup> See generally *id.* at 409-10. The court discusses the issue of individual rights mainly to dispute the Government's contention that any violation raised by counsel would be futile. *Id.*

<sup>129</sup> See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 364 n.3 (2006).

<sup>130</sup> *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997). The comment was intended to show the likelihood that counsel for a foreign national knows about the Vienna Convention Article 36 "rights." *Id.*

### B. *The Sixth Amendment*

The Sixth Amendment claim by *Osagiede* follows almost directly from Justice Ginsburg's discussion of the failure of Bustillo's trial counsel in her concurrence in *Sanchez-Llamas*.<sup>131</sup> The Seventh Circuit in *Osagiede* refers directly to this concurrence: "Through ineffective assistance of counsel claims, "full effect" could [be] given to Article 36."<sup>132</sup> In addition, the Seventh Circuit finds the petitioner's argument for Sixth Amendment relief rooted in the kind of domestic constitutional claim that the *Sanchez-Llamas* majority suggests.<sup>133</sup> As a result, such referral to Ginsburg's concurrence appears to be a solution to the search for a claim for Article 36 violations and a development consistent with the majority decision in *Sanchez-Llamas*.

Since *Strickland* forms the root of Sixth Amendment analysis and the basis for the interpretation in *Osagiede*,<sup>134</sup> an analysis of their interaction illuminates problems in the use of a Sixth Amendment claim for vindication of Article 36 rights. Discussion of the reasonableness of counsel's actions presents a possible consistency between the two cases in the dependence on professional norms for analysis.<sup>135</sup> The prejudice question raises additional problems between the two decisions because the record lacked enough facts for the court to rule on the prejudice issue in *Osagiede*.<sup>136</sup> Despite the lack of information, the court suggests what might pass the prejudice standard: *Osagiede* must show both the ability and willingness of the consulate to help him.<sup>137</sup>

Another important factor in the analysis of prejudice relates to a claim that *Strickland* rejected: the Supreme Court decided that the attorney's decisions in the respondent's sentencing hearing did not create the necessary prejudice required because it did not

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<sup>131</sup> See *supra* notes 108-109 and accompanying text.

<sup>132</sup> *Osagiede*, 543 F.3d at 407 (7th Cir. 2008) (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 363-64 & n.3 (2006) (Ginsburg, J., concurring)).

<sup>133</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. at 350 ("A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.").

<sup>134</sup> See *supra* text accompanying note 106.

<sup>135</sup> *Osagiede*, 543 F.3d at 408 (7th Cir. 2008) ("Effective performance by counsel representing a foreign national in a criminal proceeding is reasonable performance 'under prevailing professional norms.'") (quoting *Strickland*, 466 U.S. at 689).

<sup>136</sup> *Id.* at 413.

<sup>137</sup> *Id.*

significantly affect the respondent's trial.<sup>138</sup> The decision in *Osagiede* also related to the sentencing hearing of the petitioner-defendant, but perhaps involves a greater difference in the severity of penalties as a result of prejudice: the assistance of the consulate may mean the difference between an eighteen month sentence and a ninety-seven month sentence.<sup>139</sup> Such a distinction between *Osagiede* and *Strickland* perhaps forms the difference in the two outcomes, but may require more clarification in the interpretation of the standard.

### C. Policy Considerations

One possible impact of the use of a Sixth Amendment ineffective assistance of counsel claim may include a heightened burden on lawyers representing foreign nationals.<sup>140</sup> The possibility of an ineffective assistance of counsel claim based on the counsel's failure to raise a Vienna Convention violation at trial surely provides an incentive for attorneys to both educate themselves on the rights of foreign national clients and to routinely raise such a violation if it occurs. However, as the Seventh Circuit points out, "[s]imple research would have turned up [the Vienna Convention]."<sup>141</sup> Furthermore, the American Bar Association disseminates information with guidelines for the defense of foreign nationals.<sup>142</sup> This information shows that knowing the law that controls a client's case does not present a novel responsibility to the criminal trial attorney.

Because of an attorney's ethical commitment to his client,<sup>143</sup> perhaps placement of the responsibility with a foreign national's counsel represents the best solution to the violation of Article 36

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<sup>138</sup> *Strickland*, 466 U.S. at 689.

<sup>139</sup> *Osagiede*, 543 F.3d at 404-5.

<sup>140</sup> See *supra* note 107 and accompanying text.

<sup>141</sup> *Osagiede*, 543 F.3d at 409.

<sup>142</sup> Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass is Half Full*, 11 LEWIS & CLARK L. REV. 29, 44 (2007).

<sup>143</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984). In its Sixth Amendment ineffective-assistance-of-counsel analysis, the Supreme Court discusses the duties of a criminal defense attorney, listing "a duty of loyalty, a duty to avoid conflicts of interest." *Id.* at 688. In particular, the Court notes that "[c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*

rights. Such an imperative to attorneys may lead to consular involvement at earlier parts of the trial and serve the client better than information received from the adverse arresting authorities. Despite the importance of the attorney's knowledge, possible negative effects of the recognition of this Sixth Amendment claim include an exaggerated use of a violation of Article 36 rights to either delay trial action or serve as a precautionary move by the attorneys.

In the same token, the decision in *Osagiede* appears to remove the responsibility for notification of consular rights from law enforcement. This seems contradictory to the treaty's requirement that "the competent authorities of the receiving state" inform foreign nationals in custody of their rights and facilitate consular communications.<sup>144</sup> United States regulations require that authorities such as Citizenship and Immigration Services<sup>145</sup> and the Department of Justice<sup>146</sup> comply with the requirements outlined in Article 36. Additionally, the notification of Vienna Convention rights seems to intuitively belong with notification of *Miranda* rights.

Nevertheless, while *Osagiede* creates an additional incentive for attorneys to educate themselves about foreign national clients and their rights under the Vienna Convention, the case does the opposite for law enforcement: without the possibility of a claim against law enforcement agents for a violation, they may continue to do so. The shift in responsibility from law enforcement to attorneys may lead to a lack of cooperation between law enforcement and consulates, as well as the undermining of both diplomatic relations and the United States criminal justice system. Such policy issues remain as possible negative impacts of the new development in Article 36-related claims. These changes may not, however, represent a drastic shift in the law, since some authorities suggest that *Sanchez-Llamas* relieved law enforcement of this duty.<sup>147</sup> As a result, perhaps *Osagiede* creates a solution to the

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<sup>144</sup> Vienna Convention, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>145</sup> 8 C.F.R. § 236.1(e) (2009).

<sup>146</sup> 28 C.F.R. § 50.5 (2009).

<sup>147</sup> William E. Thro, *American Exceptionalism: Some Thoughts on Sanchez-Llamas v. Oregon*, 11 TEX. REV. L. & POL. 219, 221 (2007) ("Consequently, local law enforcement officials, who perform the vast majority of arrests in the United States, need not worry about their failure to identify a suspect as a foreign national and to advise the

lack of law enforcement responsibility created by *Sanchez-Llamas* by placing responsibility in the hands of defense counsel.

## V. Conclusion

The Seventh Circuit's decision in *Osagiede* represents an affirmation of the court's previous decisions on claims arising under Article 36 of the Vienna Convention, but distances the court from the Supreme Court and the other courts of appeals, on the issue of individual rights. Additionally, a decision on individual rights does not seem necessary to the use of the Sixth Amendment as basis for a claim to vindicate Article 36 rights. Since the claim comes from a progression of cases that did not evaluate the individual rights issue,<sup>148</sup> perhaps the use of the Sixth Amendment in this situation will not require a reexamination of the existence of individual rights in the Vienna Convention. Furthermore, the controlling Sixth Amendment ineffective assistance of counsel case, *Sanchez-Llamas*, appears to authorize the use in *Osagiede*. As a result, the Sixth Amendment claim provides a way for foreign nationals to vindicate their rights under Article 36 and may prevent the need for such claims when responsibility for notification lies with competent counsel.

ANGELA LEE VELEZ

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suspect that he may contact his consulate.”).

<sup>148</sup> See *supra* notes Part III.A.

